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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9
10 JOHN WITHEROW,

11 Petitioner,

12 vs.

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14 WILLIAM DONAT, *et al.*,

15 Respondents.

3:08-cv-00321-LRH-VPC

ORDER

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17 This habeas matter under 28 U.S.C. § 2254 comes before the Court for initial review under Rule
18 4 of the Rules Governing Section 2254 Cases. The filing fee has been paid. Following initial review,
19 it appears that issues exist both as to whether the petitioner exhausted the federal constitutional claim
20 presented and as to whether the petitioner in any event is entitled to relief on the merits. Petitioner
21 accordingly will be directed to show cause as further specified below.

22 ***Background***

23 Petitioner John Witherow is not seeking to set aside his judgment of conviction, his adjudication
24 as a habitual criminal, or his sentence. He instead challenges a denial of parole in a Nevada parole
25 hearing held on or about July 24, 2002. Petitioner alleges that he was denied due process of law in
26 violation of the Fourteenth Amendment because the state parole board violated the Nevada Open
27 Meeting Law in conjunction with the hearing. The Court assumes, *arguendo*, that the claim is
28 cognizable in federal habeas corpus.

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Discussion

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Exhaustion

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On the face of the petition and papers submitted, the Court *sua sponte* raises the issue of whether the federal due process claim was fairly presented to and exhausted in the state courts.

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Under 28 U.S.C. § 2254(b)(1)(A), as to each claim in the petition, a habeas petitioner first must exhaust his state court remedies before presenting the claim to the federal courts. To satisfy this exhaustion requirement, all claims must have been fairly presented to the state courts completely through to the highest court available, in this case the Supreme Court of Nevada. *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal constitutional guarantee and must also state the facts that entitle the petitioner to relief on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with both the operative facts and the federal legal theory upon which his claim is based. *E.g., Kelly v. Small*, 315 F.3d 1063, 1066 (9th Cir. 2003). The exhaustion requirement accordingly insures that the state courts, as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged violations of federal constitutional guarantees. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

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Petitioner must demonstrate that he fairly presented the federal legal theory that he alleges in this Court both to the state district court and to the Supreme Court of Nevada. That is, he must demonstrate that he presented a claim both to the state district court and the state supreme court that the parole board's alleged violation of the state open meeting law deprived him of due process in violation of the Fourteenth Amendment. He will be required both to attach copies of the papers in which he presented the federal legal theory to each state court and to identify by page and line number where the federal claim is presented in the papers.

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Merits: Liberty Interest

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Petitioner alleges a denial of due process in a Nevada parole proceeding denying him parole.

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In the context presented in this case, petitioner must establish that he was deprived of a protected liberty interest as a fundamental threshold prerequisite to any such due process claim. *See, e.g.,*

1 *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). It is well-established law that
 2 a state parole statute does not create a protected liberty interest for purposes of federal constitutional
 3 due process protections unless the state statute mandates that parole “shall” be granted following the
 4 fulfillment of specified requirements. *See Greenholtz v. Inmates of Nebraska Penal and Correctional*
 5 *Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Baumann v. Arizona Dep’t of Corrections*,
 6 754 F.2d 841, 844 (9th Cir.1985).

7 The Nevada legislature expressly has stated that release on parole is an “act of grace of the
 8 State” and that “it is not intended that the establishment of standards relating thereto create any such
 9 right or interest in liberty.” N.R.S. 213.10705; *see also Severance v. Armstrong*, 96 Nev. 836, 838-39
 10 620 P.2d 369, 370 (Nev.1980)(Nevada parole statutes provide “no legitimate expectation of parole
 11 release”). This Court accordingly has held, repeatedly over the span of several decades, that inmates
 12 have no protected liberty interest in Nevada parole hearings under the *Greenholtz* standard. *See, e.g.*,
 13 *Garcia v. Nevada Board of Prison Commissioners*, 2008 WL 818981, at *7 (D.Nev., Mar. 24, 2008);
 14 *Cooper v. Sumner*, 672 F.Supp. 1361, 1366-67 (D.Nev. 1987); *Kelso v. Armstrong*, 616 F.Supp. 367,
 15 369 (D.Nev. 1985); *Austin v. Armstrong*, 473 F.Supp. 1114, 1116-17 (D.Nev. 1979). If petitioner
 16 cannot establish a protected liberty interest in parole, he cannot establish a Fourteenth Amendment due
 17 process violation in an alleged failure to comply with the state open meeting law in conjunction with
 18 the July 24, 2002, parole hearing.

19 Petitioner therefore must show cause why his petition should not be dismissed with prejudice
 20 on the merits, for lack of the requisite protected liberty interest.

21 ***Remaining Matters***

22 Petitioner shall stop designating routine filings herein as “*ex parte*” filings. See #6. The
 23 designation “*ex parte*” is used only in the rare instance when a document should not to be filed in the
 24 open record. A document filed *ex parte* is available only to the Court and the filing party, and the filing
 25 then is not part of the open record that may be viewed by the public or an opposing party. There is
 26 nothing about the filing in #6 that warrants being filed on an *ex parte* basis rather than in the open
 27 record. If petitioner again improperly designates a filing that should be filed in the open record instead
 28 as an “*ex parte*” document, the filing will be stricken from the record with no action taken.

1 IT THEREFORE IS ORDERED that, within thirty (30) days of entry of this order, petitioner
2 shall mail for filing a response in which he shall SHOW CAUSE as follows:

3 (1) Petitioner shall show cause why the petition should not be dismissed without
4 prejudice for lack of exhaustion of state judicial remedies, shall attach with the
5 response the papers upon which he bases his claim of exhaustion, and shall
6 identify by page and line number within those papers where he presented the
7 federal legal theory, both to the state district court and the Supreme Court of
8 Nevada, that the parole board's violation of the state open meeting law deprived
9 him of due process in violation of the Fourteenth Amendment; and
10 (2) Petitioner shall show cause why the petition should not be dismissed with
11 prejudice on the merits on the basis that he cannot satisfy the threshold
12 requirement of a protected liberty interest necessary to present a viable
13 Fourteenth Amendment due process claim.

14 If petitioner does not timely respond fully to this order, the petition will be dismissed with
15 prejudice without further advance notice. If petitioner responds to this order but fails to show cause as
16 directed herein, the petition will be dismissed either for lack of exhaustion and/or on the merits.¹

17 DATED this 10th day of November, 2008.



20 LARRY R. HICKS
21 UNITED STATES DISTRICT JUDGE
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28 ¹The Court defers consideration of any additional screening issues pending resolution of the present show cause inquiry, and this order does not explicitly or implicitly hold that the petition otherwise is free of deficiencies.